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June 2, 1992

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Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Rm. 222  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: GC Docket No. 92-52  
Notice of Proposed Rulemaking  
Comparative Broadcast Hearings

Dear Ms. Searcy:

Enclosed is the original for filing, and ten (10) copies of Comments filed jointly by the Association for America's Public Television Stations ("APTS") and National Public Radio ("NPR"), in the above-referenced matter.

Please date stamp one of the enclosed copies and return to APTS with our messenger today.

Sincerely,



Karen Christensen  
Assistant General Counsel, NPR



Marilyn Mohrman-Gillis  
General Counsel, APTS

MMG:nk

Enc.

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

JOINT COMMENTS OF  
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AND NATIONAL PUBLIC RADIO

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June 2, 1992

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JOINT COMMENTS OF  
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS  
AND NATIONAL PUBLIC RADIO

The Association of America's Public Television Stations ("APTS"), and National Public Radio ("NPR") (jointly, "Public Broadcasters") respectfully submit these joint comments in response to the Notice of Proposed Rule Making in the above-captioned matter, released April 10, 1992 (the "Notice").

APTS is a nonprofit membership association whose members comprise virtually all of the nation's 345 public television stations. Among other things, it represents its membership on a national level by presenting the stations' views to the Commission, Congress, the Executive Branch and to other federal agencies and policy makers. NPR is a nonprofit, noncommercial organization which provides programming and interconnection services to 445 full service public radio stations and represents them in developing and maintaining a viable and diverse public radio service for the American public.

## INTRODUCTION AND SUMMARY

The Commission has proposed to re-examine its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) ("*Policy Statement*"), which sets forth the criteria to be used to select among competing applicants for authority to construct new commercial broadcast facilities. The Commission selects from mutually exclusive noncommercial educational applicants using largely different criteria. The standard criteria that have been applied in noncommercial comparative cases are threefold: (1) which applicant will best integrate the operation of the proposed station into the overall educational and cultural objectives of the applicant; (2) the manner in which the proposed operation of the competing applicants will meet the needs of the community to be served; and (3) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service.<sup>1</sup>

Specifically, with respect to the noncommercial area, the Commission seeks comment on:

- its tentative conclusion to eliminate the current noncommercial comparative criteria;
- whether the criteria used to select commercial applicants are relevant in noncommercial proceedings;
- whether it should use different or additional criteria from those used in the commercial context;
- whether it should use a modified version of the point system, including a tie-breaker, proposed for comparing commercial applicants; and
- whether a different comparative approach should be followed for state-owned public broadcasters as opposed to other noncommercial applicants.

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<sup>1</sup> See pp 4-7 *infra* for a complete discussion of the development of the noncommercial comparative criteria.

APTS and NPR are commenting solely on the issues concerning noncommercial broadcast applicants. For the reasons set forth in detail below, APTS and NPR submit that:

- The commercial comparative criteria—diversity of ownership and integration of ownership and management (including its enhancement factors)—are not applicable in noncommercial comparative proceedings. Their application would not lead to the selection of a public broadcast licensee that would best serve the public interest.
- The Commission should not eliminate the criteria that are currently used to select among competing noncommercial applicants. While we agree that these criteria have been difficult to apply, we submit that this difficulty is rooted in the fact that the Commission has never (by rule or adjudication) articulated a clear, cohesive set of guidelines for comparing noncommercial applicants. The existing criteria reflect the mandate of public broadcast licensees to provide educational and cultural services to their communities. The solution is not to abandon valid criteria that have never been properly implemented, but rather to provide needed guidance for applying these criteria in a way that will lead to sound public interest determinations.
- The Commission should consider formally adopting the set of guidelines proposed by Public Broadcasters herein (or devising its own set of guidelines) aimed at selecting the applicant that will best implement the objectives set by the Commission and Congress for public broadcasters.
- The Commission should not adopt a modified version of the point system it proposes for commercial comparative proceedings. Such a system cannot be applied to the criteria for selecting noncommercial licensees and is unnecessary given the small number of noncommercial comparative cases that come before the Commission.
- The Commission should not adopt a different set of comparative criteria for state licensees. Since most comparative cases which involve state applicants are contests between state institutions and non-profit organizations, a single set of criteria for both types of applicants is required for a meaningful comparison. A state applicant can receive credit in comparative cases where its proposed services and operation advance the goals embodied in the comparative criteria.

## BACKGROUND

### The Development of the Noncommercial Criteria

As the Commission has long acknowledged, "the noncommercial broadcast service, by definition, differs markedly from the commercial service." *Educational Broadcast and Renewal Applications*, 42 FCC 2d 690, 694 (1973); see also *Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 98 FCC 2d 746, 751 (1984) (hereinafter, "1984 Public Broadcasting Deregulation Order").

This different purpose is embodied in the distinct requirements for noncommercial licensees. A noncommercial television license is to be used "primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." See 47 C.F.R. § 73.621(a) (1992). Noncommercial radio licenses are likewise granted to provide a noncommercial broadcast service "for the advancement of an educational program." 47 C.F.R. § 73.503(a) (1992). An applicant for a noncommercial license must meet certain eligibility requirements, which further distinguish noncommercial from commercial licensees, and set out their respective educational programming goals.<sup>2</sup> Through the *Public Broadcasting Act of 1967*, Congress reinforced public broadcasters' unique mission to use media for "instructional, educational, and cultural purposes."<sup>3</sup> In recognition of its unique goals and operating structure, the Commission has developed separate comparative factors for noncommercial broadcasters.

In *New York University*, 10 RR 2d 215 (1967) ("*New York University I*"), the Commission was faced with the first comparative case between two noncommercial

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<sup>2</sup> See Notice of Inquiry in Docket No. 78-164, 43 Fed. Reg. 30842 (1978) ("*Processing Guidelines*"). See also FCC Form 340, Section II, Item 4 (May 1989).

<sup>3</sup> *Public Broadcasting Act of 1967*, Pub. L. 90-129, 81 Stat. 368 (1967) (codified as amended at 47 U.S.C. § 396(a)) ("*Public Broadcasting Act*").



applicants since its 1965 *Policy Statement*. The Commission found that the "standard commercial criteria (local residence, integration, broadcast experience, diversification, etc.) are virtually meaningless" in the noncommercial context. *New York University I* at 217. In reaching this conclusion, the Commission cited the purpose behind the initial FM educational reservations made by the Commission in early 1938: to grant an applicant an educational facility to assure "the advancement of its educational work and . . . the transmission of educational and entertainment programs to the general public."<sup>4</sup>

In light of this educational purpose, the Commission specified the following issue for comparing the two university licensees:

To determine the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; or whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

*Id.* at 218.

The *New York University I* test for comparing noncommercial applicants was subsequently expanded by the Review Board in *Pacifica Foundation*, 21 FCC 2d 216 (Rev. Bd. 1970). The Board, in comparing two non-university applicants, included in the "integration of operation" test consideration of the cultural objectives of the respective applicants. The Review Board also added an inquiry to determine the extent to which the respective objectives of the applicants meet the needs of the community to be served. The Review Board reasoned that the community needs issue was an appropriate consideration since neither applicant was a university, both stated their intention to serve the community, and service to the community is

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<sup>4</sup> See Rules 1057 and 1058, 3 Fed. Reg. 312 (1938), cited in *New York University I*, *supra* at 217. This determination was recently affirmed by the full Commission. See *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 259 (1991) (no public interest reason to modify the noncommercial comparative factors) ("*Real Life I*"). See Part I for further discussion.

envisioned in the eligibility criteria for noncommercial licensees. *Id.* at 218.

Accordingly, the Board specified the following as the appropriate comparative issue:

To determine the extent to which each of the proposed operations will be integrated into the overall cultural and educational operation and objectives of the respective applicants as well as the manner in which such objectives meet the needs of the community to be served; or whether other factors in the record demonstrate that one applicant will provide a superior educational FM broadcast service.

*Id.* at 221.

This expanded comparative issue was subsequently ratified in successive hearing designation orders and noncommercial comparative cases. *See Seattle Public Schools*, 4 FCC Rcd 625, 626 (Rev. Bd. 1989) ("*Seattle Public Schools*"); *Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34 (Rev. Bd. 1984) ("*Black Television Workshop*"); *Southeastern Bible College*, 85 FCC 2d 936, 937 (Rev. Bd. 1981) *rev. den.* FCC 82-271, June 11, 1982 ("*Southeastern II*"); *Maricopa County Community College District*, 5 FCC Rcd 4081 (ALJ 1990) ("*Maricopa County*").

In *Seattle Public Schools*, the Review Board elaborated on the "community needs" prong of the noncommercial comparative issue. It stated an applicant "must at least be able to show that it has broadly surveyed (in a flexible fashion) its community, and that its proposal is responsive to that survey, not simply to its own esthetic proclivities or to the entertainment preferences of a select few." *Id.* at 642.

Under the "other factors," prong, the Review Board and ALJs have generally considered areas and populations served, hours of operation proposed and promises to install auxiliary power equipment.<sup>5</sup>

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<sup>5</sup> See, e.g., *Maricopa County*, *supra* at 4092 (slight preference awarded to applicant with both total and third service coverage advantage); *Real Life Educational Foundation of Baton Rouge*, 6 FCC Rcd 2577, 2579 (Rev. Bd. 1991) application for review pending ("*Real Life II*") (considering auxiliary power and awarding slight preference to applicant with substantial coverage advantage within well served area). See also, *Seattle Public Schools*, *supra* at 642 (recognizing hours of operation as appropriate consideration under other factors prong of noncommercial issue); *Southeastern Bible*

Recently, the "community needs" criterion has been omitted from Hearing Designation Orders.<sup>6</sup> In *Real Life II*, the Review Board determined that this omission, which was not explained by the Bureau, must be "in belated obeisance to the Commission's 1984 [Public Broadcasting] Deregulation Order."<sup>7</sup> Accordingly, the Review Board refrained from comparing competing applicants on the "community needs" criterion. At the same time, it urged the Commission to "initiate a considered review of its noncommercial comparative criteria. . . ." *Real Life II*, *supra* at 2578.

It is that review that the Commission has appropriately undertaken in this proceeding.

## **I. THE COMMERCIAL COMPARATIVE CRITERIA SHOULD NOT BE APPLIED TO APPLICANTS FOR NONCOMMERCIAL FREQUENCIES**

The Commission asked in the *Notice* whether the criteria used to select commercial applicants are relevant in noncommercial comparative proceedings.

As discussed above, the Commission first decided this issue in *New York University I*, where it found that the standard commercial criteria were "virtually meaningless" in the noncommercial context. The Commission recently confirmed this view in *Real Life I*. There, the Commission addressed one of the same issues it raises here:

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College, 85 FCC 2d 943, 958 (ALJ 1980) ("*Southeastern I*") (potential censorship by applicant held appropriate consideration under other factors prong of noncommercial issue).

<sup>6</sup> See *Real Life II*, *supra* at 2577; *Maricopa County*, *supra* at 4090; *Cabrini College*, 4 FCC Rcd 5462 (1989). Although the Hearing Designation Order in *Maricopa County* omitted the "community needs" criterion, the ALJ read that criterion into the order in issuing a decision in the case.

<sup>7</sup> *Real Life II*, *supra* at 2578. In its 1984 *Public Broadcasting Deregulation Order*, the Commission determined that it would no longer impose a duty to ascertain community needs, pursuant to formal ascertainment procedures, on noncommercial broadcasters. *Id.* at 752-54.

Should the co-ownership of other media "voices" (commercial or noncommercial) now be recognized as a comparative factor in contests for noncommercial frequencies.

*Real Life I*, *supra*, at 259. After careful consideration of the issue,<sup>8</sup> the Commission reasoned that the policy considerations involved in noncommercial comparative cases are quite distinct from those involved in commercial cases. The Commission continued:

In recognition of those differences, we have consistently applied the separate criteria outlined in *New York University* which exclude diversity of programming from comparative noncommercial educational proceedings. [Footnote omitted.] . . . We find no public interest reason to modify the criteria recognized as comparative factors in an individual contest for a noncommercial educational license.

*Id.* at 260.

For the reasons stated below, the Commission's early determination in *New York University I*, recently affirmed in *Real Life I*, that the standard commercial comparative criteria are inapplicable in the noncommercial context is clearly correct.

**A. Due to the Unique Purpose and Operational Structure of Noncommercial Stations, A Diversity of Ownership Criterion Is Unnecessary and Inappropriate**

**1. Diversity Is Not Relevant to the Educational Purpose for Granting a Noncommercial License**

In 1965, the Commission adopted diversity of ownership as a commercial comparative criterion to promote the "maximum diffusion of control of the media of mass communication." *Policy Statement* at 394.

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<sup>8</sup> This issue was before the Commission on certification from the Review Board, and was fully briefed by the parties as well as in amicus pleadings filed by APTS (under its former name of The Association for Public Broadcasting), NPR, Public Broadcasting Entities and Arizona State University.

While maximum diffusion of control is an important policy behind the grant of a commercial license, it does not further the distinct purpose for granting a noncommercial license -- to serve the educational needs of the community and for the advancement of an educational program. *See* p. 4 *supra*.

In *Real Life I*, the Commission specifically recognized that diversity of ownership has no relationship to the purposes for granting noncommercial licenses:

Because a central purpose for setting aside the [noncommercial] channels was to assist educational entities advance their educational work, the number of other stations owned by an applicant, commercial or noncommercial, is irrelevant to the determination of which applicant would best serve that purpose.

*Real Life I, supra* at 260. In short, diversity is not a factor that would lead to the selection of the best noncommercial licensee because it has nothing to do with determining an applicant's ability to serve the educational needs of the community.

## **2. Diversity of Ownership of Noncommercial Stations is Not Necessary to Foster Program Diversity**

Moreover, it is not necessary to apply a diversity of ownership criterion in the noncommercial context to foster diversity of programming. Diversity of programming is a fundamental mandate of public broadcast licensees. Congress intended that public broadcasting would "constitute an expression of diversity and excellence," would provide "diversity of programming [through] freedom, imagination, and initiative on both local and national levels" and would provide programming "that addresses the needs of unserved and underserved audiences, particularly children and minorities."<sup>9</sup>

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<sup>9</sup> *Public Broadcasting Act*, 47 U.S.C. at § 396(a).

There are a number of mechanisms in place in the public broadcast system that encourage diversity of programming. Unlike commercial broadcasters, which are required to maximize audiences for any given program to ensure adequate advertising revenues, public broadcasters have a diversity of funding sources. This frees and encourages them to serve the many different audiences within their communities, including those audiences too small to justify commercially supported programming.

Moreover, public broadcasters have put in place a mechanism for distributing federally appropriated funding to stations pursuant to criteria designed to further the purposes of the *Public Broadcasting Act of 1967*, including diversity of programming. For example, a public broadcast licensee that operates more than one station may only obtain a separate Community Service Grant ("CSG")<sup>10</sup> from the Corporation for Public Broadcasting ("CPB") for additional stations if it provides separate and distinct programming services on each station. As a result, in those cases in which a licensee operates more than one radio or television station, it typically programs the stations differently.

Public broadcasters have a record of fulfilling their mandate to offer a diversity of program services and voices,<sup>11</sup> and continue to strive to improve upon

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<sup>10</sup> CSGs are funds granted to public broadcast stations, pursuant to criteria designed to further the purposes of the *Public Broadcasting Act*. They constitute about two-thirds of the federal appropriation for public broadcasting and they are unrestricted funds that can be used at the discretion of the licensee.

<sup>11</sup> For a survey of some of public broadcasting's recent efforts to serve minority audiences, see, e.g., Corporation for Public Broadcasting, *Many Faces, Many Voices: A Report to the 101st Congress* (1990); APTS, *Local Public Television Services for Minorities and Special Audiences, A Special Report* (1989); Corporation for Public Broadcasting, *Public Radio Stations Grant Review, Final Report* (1992).

Recent data collected by APTS shows that two or more television stations in a metropolitan area provide different programming for different audiences. In eight markets during a typical week, the average program duplication was relatively small: 2 % same day, same time; 7% same day, different time; 6% same week, different day; and 15% anytime during the week.

this record.<sup>12</sup> Given the structure and operation of public broadcasting, as well as its record of providing diverse programming, it is not necessary to favor diverse owners to achieve diverse programming in public broadcasting.

### **3. Application of Diversity Criterion in Noncommercial Comparative Cases Would Disserve the Public Interest**

Use of the commercial diversity of ownership criterion would undermine potential economic efficiencies that would benefit the public in the provision of public service programming. Underlying the commercial diversity criterion is an assumption that the marketplace will support a number of broadcast outlets and that the Commission can facilitate access to different programs and differing viewpoints by spreading the ownership of those outlets among as many entities as possible. Imposing potential overhead costs on noncommercial broadcasters reduces the resources available to promote diversity through quality educational programming. However, maximizing the diversity of ownership of noncommercial stations would not serve its intended purpose of ensuring diversity of programming. Moreover, it would increase the risk that individual stations will be financially weaker, and therefore less able to offer the diverse, quality programming.

The benefits that licensees can achieve from utilizing market efficiencies, even in the commercial context, are well known.<sup>13</sup> For public broadcasters who

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<sup>12</sup> Most recently, CPB and the public radio community have conducted a thorough review of the criteria for awarding CSG grants with a goal of targeting additional resources to rural stations and stations serving minority audiences. National Public Radio has also worked to broaden its cultural programming offerings by establishing a new research and development unit to identify fresh ideas for creative new programming reflecting America's diversity.

<sup>13</sup> As the Commission explained in its most recent action to relax its radio multiple ownership rules:

Relaxing our radio ownership restrictions will grant operators greater opportunity to combine administrative, sales, programming, promotion, production, and other functions, as well as to share studio space and equipment. Not only will such efficiencies enable radio stations to

have since their inception operated with limited and frequently inadequate funds, efficiencies derived from consolidated management of stations are even more critical.<sup>14</sup> Common management, fund raising efforts, studio facilities, engineering staff, development staff, and other operational economies permit commonly-licensed stations to maximize their resources devoted to programming and public service and thereby increase the diversity of programming offered.

The Commission has further recognized the importance of efficiencies that derive from multiple "ownership" of noncommercial broadcast facilities by specifically exempting noncommercial licensees from its multiple ownership rules. See 47 C.F.R. § 73.3555(f) (1992).<sup>15</sup> It would be anomalous for the Commission to make diversity a criterion in noncommercial comparative hearings when it is moving in precisely the opposite direction by relaxing its multiple ownership rules applicable to commercial licensees.<sup>16</sup>

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improve their competitive standing, they may also play a significant part in improving the diversity of programming available to the public.

*Revision of Radio Rules and Policies in MM Doc. 91-140, 70 RR 2d 903, 912 (1992). See also Broadcast Multiple Ownership Rules (One-to-a-Market Rule), 65 RR 2d at 1589, 1598-1604 (1989), (lists an extensive catalogue of the benefits of common ownership from both an operational and programmatic perspective); Report and Order in Gen. Docket No. 83-1009, 100 FCC 2d 17, 45 (1984) (Ownership Report and Order), on reconsideration, Ownership Reconsideration Order, appeal dismissed sub. nom. National Association of Black Owned Broadcasters v. FCC, No. 85-1139 (D.C. Cir. Jan. 4, 1991); Second Report and Order, in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989) (illustrates economies of scale and other efficiencies that can be achieved via group ownership in general).*

<sup>14</sup> See, e.g., *Notice of Proposed Rule Making in BC Docket No. 78-165*, 68 FCC 2d 831, 833 (1978) (much of public broadcasting's achievements have been made possible by realizing the economies of scale and scope that multiple ownership affords).

<sup>15</sup> See *Real Life I*, *supra* at 259 ("diversity is a corollary to the multiple ownership rules, ... [a]ny application of diversification to noncommercial contests would . . . require a change in the multiple ownership rules to include noncommercial broadcasters."); see also, *Notice of Proposed Rule Making in MM Docket 91-140*, 6 FCC Rcd 3275, 3281-82 (1991).

<sup>16</sup> See *Relaxation of National and Local Television Ownership Restrictions*, FCC News Release, May 14, 1992, describing *Notice of Proposed Rulemaking* adopted in MM Docket 91-221 (television ownership rules); *Notice of Proposed Rule Making in MM Docket 91-140, supra*; *Broadcast*



Finally, application of the diversification criterion in noncommercial comparative cases would impede the selection of licenses based on the quality and character of the service to be offered. For example, it could prejudice an applicant proposing superior program service tailored to the unique needs of unserved or underserved segments of the community merely because the applicant is the licensee for a station in a neighboring community or across the state. It would place at a comparative disadvantage existing licensees, who through the efficiencies inherent in common operation, seek to offer new, creative, supplemental, or alternative services. And, it would unreasonably prejudice state networks that attempt to serve unserved areas, to improve service in areas of the state where their signal is weak, or to offer a second public television or radio service to the state.

The ultimate effect of using diversification as a noncommercial comparative criterion would be to limit the Commission's flexibility to select applicants that will best serve the Commission's original purposes in reserving spectrum for and awarding noncommercial licenses.

**B. Integration Of Ownership And Management Would Be A Meaningless Noncommercial Comparative Factor**

Because of the unique governance and operating structure of noncommercial stations, the other significant commercial criterion—integration of ownership with management—is likewise meaningless in the noncommercial context.<sup>17</sup>

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*Multiple Ownership Rules (One-to-a-Market Rule), supra; Multiple Ownership Rules—Seven Stations Rule, 56 RR 2d 859 (1984).*

<sup>17</sup> The *Policy Statement* also identified proposed program service, past program record and efficient use of the spectrum, as factors tending to demonstrate a commercial applicant's superior public service potential. Of these factors, proposed program service is already included within the existing noncommercial criteria. (See Part II.C.1., *infra*.) Past program record and efficient use of spectrum are factors that the public broadcasters suggest should be formally adopted by the Commission as part of a noncommercial comparative analysis. See Part II.C.2. & 3., *infra*.

Public broadcasting stations are not "owned" in the same way that commercial stations are owned. They are, by definition, licensed to noncommercial educational organizations. 47 C.F.R. §§ 73.503(a) and 73.621(a). These include local school boards, non-profit educational corporations, public and private colleges and state public telecommunications entities.

The governing boards of these organizations are essentially the "owners" of the stations, though it is more accurate to conceive of them as being responsible for station policy. The composition of the governing boards is generally determined by the licensee's organizational or enabling document. These organizational documents are generally designed to ensure that the board—and therefore, the station—is representative of the community.<sup>18</sup>

In its 1984 *Public Broadcasting Deregulation Order*, the Commission recognized that public broadcasters have a "special direct contact" with the public by virtue of their noncommercial status.<sup>19</sup> The Commission looked at the diverse types of governing boards and determined that the control structure of noncommercial stations fully encourages community responsiveness.<sup>20</sup>

Moreover, the financial framework in which noncommercial stations operate also assures community responsiveness. In fiscal year 1991, for example, CPB funding of noncommercial broadcasting accounted for 13.5% of the system's total

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<sup>18</sup> In addition, applicants for noncommercial television channels are required to submit "evidence that officers, directors, and members of the governing board are broadly representative of the educational, cultural and civic groups in the community." See FCC Form 340, Section II, Item 3 (May 1989).

<sup>19</sup> See 1984 *Public Broadcasting Deregulation Order*, *supra* at 752.

<sup>20</sup> *Id.* at 754. The Commission recognized that many public broadcasters are required to have community advisory boards in addition to their governing boards. These assist stations in being responsive to community needs. For stations licensed to state or local jurisdictions (not required to have community advisory boards), the Commission recognized accountability in the fact that their boards are made up of elected officials who are accountable through the electoral process or are subject to the direction of their governing educational institution. *Id.*

support, while contributions from viewers accounted for 23% of the total and contributions from public radio listeners amounted to 20%. Each public broadcast station depends for its survival on local community support, and each must serve community needs to earn that support. Thus, by virtue of its governing and funding mechanics, public broadcasting is already structured to meet the fundamental purpose behind the integration of ownership factor: to insure that the licensee will be responsive to community needs.<sup>21</sup>

Moreover, the factor is meaningless when applied in the noncommercial context. The assumption underlying the integration factor is that an owner, integrated into the day-to-day management, will provide better local service than a nonintegrated owner. In public broadcasting, there are no "owners" that can be integrated into the day-to-day operations of the station. It is generally not practical, and often not possible, for the governing boards of noncommercial licensees to manage the station's day-to-day operations. Rather, they generally set the policies for station operations, and perform general oversight of station management.

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In sum, the Commission's determination 25 years ago that the commercial criteria were meaningless in noncommercial comparative cases continues to be valid today. Public Broadcasters urge the Commission to renew this finding based on its recognition of the unique function of noncommercial broadcasters.

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<sup>21</sup> The governing boards also meet the fundamental purpose behind the enhancements under the integration factor for proposed minority and female ownership of the broadcast facility. Because they are designed to be broadly representative of the communities they serve, governing boards of noncommercial licensees have comparatively good minority and female representation. According to CPB data, most noncommercial stations receiving funds from CPB have an average of 19% minority participation and 49% female participation on their governing boards. See CPB Race and Gender Classification Comments, *MM Docket 86-484* at 20 (May 1987).

## II. THE PRESENT NONCOMMERCIAL CRITERIA SHOULD BE MAINTAINED WITH ADDITIONAL GUIDANCE ISSUED TO AMPLIFY AND CLARIFY THEM.

Citing repeated frustration expressed by the Review Board with applying the “vague” noncommercial comparative criteria,<sup>22</sup> the Commission tentatively concluded that the noncommercial criteria should be eliminated. *Notice* at para. 40.

APTS and NPR strongly urge the Commission, for all of the reasons discussed below, to reconsider this tentative conclusion.

### A. Abandonment of the Present Noncommercial Comparative Criteria Would Be Premature

Applicants for public broadcast licenses have shared the frustration that has been repeatedly expressed by Administrative Law Judges (ALJ's) and the Review Board with applying the “vague” noncommercial criteria. However, the problems are not rooted in the criteria themselves, but in the lack of clear guidelines for applying them.

Since 1967, when the Commission in *New York University I* articulated the first prong of what has become the operative standard, the full Commission has never, either in a rulemaking or an adjudication, defined or applied the noncommercial comparative criteria. Moreover, unlike in the commercial context, where there is substantial precedent to guide both decision makers and applicants, there is minimal precedent in the noncommercial area. Only a fraction of the comparative cases filed are contests between noncommercial licensees. Among

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<sup>22</sup> See *Real Life II*, *supra* at 2580 n.8; accord, *Black Television Workshop*, *supra* at 35.

these, very few have progressed to an ALJ decision and even fewer have resulted in Review Board decisions.<sup>23</sup>

Those that do make it to an ALJ or the Review Board are generally not decided based on the criteria. Faced with ill-defined criteria and no road map for applying them, decision makers have been attracted to “time sharing”—a Solomon-like practice of “splitting the baby”—for deciding noncommercial cases.<sup>24</sup> This solution, which Public Broadcasters argue below is inconsistent with the public interest, is driven, not by the merits of time sharing, but rather by the lack of clearly defined criteria and guidelines for selecting noncommercial applicants.

The answer is not to abandon criteria that have never really been applied in any meaningful way—particularly when those criteria are directly related to the FCC’s goals in granting noncommercial licenses.

**B. The Present Noncommercial Criteria Are Directly Related to the FCC’s Goals in Granting Noncommercial Licenses**

The comparative hearing process is intended to protect the public interest by insuring that only the best qualified applicants are granted broadcast licenses. *See Policy Statement, supra* at 393.

The Commission has defined service in the public interest for noncommercial broadcasters. They must serve the educational needs of their communities and advance an educational program, *see FCC Processing Guidelines, supra*, 43 Fed. Reg. at 30851; and they must provide programming that is responsive

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<sup>23</sup> See *Joint Comments of NCE Licensees* filed in this Docket. Of the 91 noncommercial hearing designation orders rendered in the last ten years, only 10 were decided on the merits by an ALJ, and only three reached a decision on the merits by the Review Board.

<sup>24</sup> See, e.g., *New York University*, 19 FCC 2d 358 (Rev. Bd. 1969) (“*New York University II*”); *Southeastern II, supra*; *San Antonio Educational Television, Inc.*, FCC 85D-24 (ALJ, released April 10, 1985); *Maricopa County, supra*.

to community interests and needs. *See 1984 Public Broadcasting Deregulation Order, supra at 751-52.*

The existing noncommercial criteria are directly related to the Commission's goals for selecting a noncommercial applicant. They require an evaluation of: 1) which applicant will best integrate the station operations with its educational and cultural objectives; 2) which applicant's proposed operations will best meet community needs; and 3) whether any other factors in the record demonstrate that one applicant will provide a superior noncommercial service.

APTS and NPR attempted, in consultation with a variety of persons with expertise in handling noncommercial comparative hearings, to identify "different and better" criteria for evaluating noncommercial applicants. The result, after much discussion, was the unanimous view that the existing criteria—which are directly tied to the Commission's goals in awarding noncommercial licenses—provide the best framework for a noncommercial comparative analysis. The cure is not to eliminate them, but rather to refine them and provide concrete guidelines for applying them as proposed by APTS and NPR below.

**C. The Commission Should Refine the Existing Criteria and Identify Relevant Factors to be Considered Under Each Criterion**

APTS and NPR urge the Commission to articulate a clear analytical approach for comparing competing noncommercial applicants that will guide both the Commission and the parties toward a determination of the applicant that will best serve the public interest. Below are the standard noncommercial comparative criteria with proposed refinements and clarifying guidelines.

**1. Integration of Proposed Service into the Educational and Cultural Objectives of the Applicant**

As discussed above, the first prong of the noncommercial comparative issue is which applicant will best integrate its proposed operations into its overall educational and cultural objectives. As a preliminary matter, APTS and NPR propose that this criterion be interpreted to accurately reflect the expanded purpose for public broadcasting stations reflected in the *Public Broadcasting Act*.

Public broadcasting as an institution has developed and grown since the *New York University* and *Pacifica* cases. Public broadcasters effectively use television and radio programs as the basis for community outreach on social and community issues. For example, public television stations have sponsored Project Literacy U.S., a nationwide project of adult education through volunteers. Public radio stations recently participated in "Class of 2000," a special NPR project focusing on young people in America, including a series of broadcast reports on issues such as prejudice, family life, and affirmative action. A crucial part of the project was the participation of national and local organizations which served as information resources and publicized the radio programming, in addition to sponsoring their own related projects. In addition to these and other similar national activities, local stations also participate in a variety of community outreach projects such as food drives, literacy campaigns and book drives for hospitalized children.

The importance of the nonbroadcast component of public television and radio service has been recently recognized by the House of Representatives in authorizing funds for public broadcasting. The *Public Telecommunications Act of 1991* (passed by the House on November 25, 1991) adds to the congressional findings regarding public broadcasting:

[P]ublic television and radio stations constitute valuable local community resources for utilizing electronic media

to address national concerns and solve local problems through community programs and outreach programs.<sup>25</sup>

The accompanying House Report "recognizes the unique ability of local public television and radio stations . . . to bring together organizations, businesses, state and local agencies, parents, and other individuals to examine problems and seek solutions through the use of electronic media."<sup>26</sup>

To reflect this congressional intent, Public Broadcasters urge the Commission to clarify that such broad educational activities are included in the "educational and cultural objectives" in the noncommercial comparative issue.<sup>27</sup>

APTS and NPR propose below an analytical framework to enable the Commission to choose among competing applicants under the "integration of service" criterion.

### ***The Applicant States Clear and Definable Educational and Cultural Objectives***

The extent to which an applicant states clear and definable educational and cultural objectives should be the starting point for the ALJ's comparative analysis. The applicant must present evidence that it has, as an integral part of its

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<sup>25</sup> H.R. Rep. No. 2977, § 396 (a)(8), Cong. Rec. H 11225, H 11226 (Nov. 25, 1991). A companion bill (S. 1504) is currently awaiting final vote in the Senate.

<sup>26</sup> House Committee on Energy and Commerce, Public Telecommunications Act of 1991, H.R. Rep. No. 102-363, 102nd Cong., 1st Sess. 18 (1991).

<sup>27</sup> It is also important in this context to note an important difference in the way that television and radio fulfill their educational mission. Although public radio has been an educational medium since its inception, over time it has become clear that public radio's role in education can best be fulfilled through radio's ability to provide information to the listening public. While many public radio stations provide "educational or instructional" programming in the traditional sense, local public radio stations, by their nature, extend educational opportunities for all the citizens they serve. All public radio stations are important sources of news, information, and cultural programming in their communities. In contrast, public television, in addition to a broad range of educational and cultural programs, fulfills its educational mission by providing instructional programming for in-school uses and adult education.



organizational purpose, educational and cultural objectives.<sup>28</sup> These objectives can be found in an applicant's organizational or enabling documents, documents generally available to the public, or will be clear upon examination of the applicant's past activities. An applicant would earn credit under this factor to the extent that it has established objectives and the objectives are clearly defined as educational and cultural. Evidence that the objectives are articulated in an organizing document, that the objectives have been effectively pursued by the applicant in the past, and that the applicant has an established mechanism to measure successful achievement of its objectives, would be admissible and weighed in the applicant's favor.

While we do not believe that it is appropriate, as a general matter, for the Commission to engage in a comparison of objectives to determine which are more meritorious, we believe it is appropriate for the Commission to discriminate between applicants' objectives where there are clear public interest considerations. For example, educational and cultural objectives that are "directed outwardly to the station's listening community, and not directed exclusively to the licensee itself" have a clear public interest advantage.<sup>29</sup>

***The Applicant's Proposed Broadcast and Related Nonbroadcast Service Will Support the Educational and Cultural Objectives of the Applicant***

Implied in this factor is the requirement that the applicant first be able to describe adequately its proposed program service. This includes not only the anticipated program format, but also its plan for program promotion, development

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<sup>28</sup> This demonstration should be distinguished from an applicant's initial satisfaction of the noncommercial eligibility criteria. See *Way of Cross of Utah*, 58 RR 2d 455 (1985) (applicant whose governing board did not reflect educational, cultural and civic groups, and whose proposed service was not primarily educational in nature, held not to qualify as an educational organization under the Commission's eligibility rules).

<sup>29</sup> See *Seattle Public Schools*, *supra* at 641 (applicant's educational objective of providing broadcast training for its students considered unsatisfactory educational objective because it was directed exclusively at the licensee itself).